

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

NATHANIEL LEE,

Defendant-Appellee.

UNPUBLISHED

July 20, 2001

No. 232011

Oakland Circuit Court

LC No. 2000-172582-FC

Before: Wilder, P.J., and Hood and Griffin, JJ.

MEMORANDUM.

The prosecution appeals by leave granted the trial court's order granting defendant's motion in limine. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant is charged with conspiracy to possess with intent to deliver and/or to deliver 650 grams or more of a controlled substance. MCL 333.7401(2)(a)(i) and MCL 750.157a. The conspiracy, which involves a number of alleged co-conspirators, spans from January 1985 through September 1998. Defendant was previously tried for possession with intent to deliver more than 50 but less than 225 grams of cocaine. MCL 333.7401(2)(a)(iii). This charge arose out of a 1994 raid on a Pontiac home. Following a jury verdict convicting defendant, the trial court granted defendant's motion for directed verdict for acquittal. This Court affirmed. *People v Nathaniel Lee*, unpublished memorandum opinion of the Court of Appeals, issued 11/25/1997 (Docket No. 199734).

The prosecution asserts that its investigation of this conspiracy has revealed additional evidence regarding the 1994 raid. It seeks to admit evidence pertaining to that raid to support the conspiracy theory. Defendant moved in limine to preclude the admission of the evidence, arguing that its admission violates his right to be free from double jeopardy. The trial court granted his motion.

The prosecution appeals, arguing that the Double Jeopardy Clauses of the federal and Michigan constitutions, US Const, Am V; Const 1963, art 1, § 15, do not preclude the admission of the evidence or bar the prosecution for conspiracy. We agree.

The Double Jeopardy Clause protects a person from a second prosecution for the same offense after acquittal. *People v Torres*, 452 Mich 43, 64; 549 NW2d 540 (1996). However, because a substantive crime and a conspiracy to commit that substantive crime are not the same for purposes of double jeopardy, defendant's prosecution for conspiracy, which involves the circumstances of the possession offense, is not barred by double jeopardy. *United States v Felix*, 503 US 378, 390-391; 112 S Ct 1377; 118 L Ed 2d 25 (1992). In addition, because the acquittal of the earlier possession with intent to deliver charge did not resolve an issue of ultimate fact in the current conspiracy prosecution, the evidence admitted in the earlier proceeding is admissible in the conspiracy prosecution. *Dowling v United States*, 493 US 342, 347-348; 110 S Ct 668; 107 L Ed 2d 708 (1990); *People v Oliphant*, 399 Mich 472, 499; 250 NW2d 443 (1976). Thus, the trial court erred in granting defendant's motion in limine based on double jeopardy.

Reversed and remanded. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Harold Hood

s/ Richard Allen Griffin